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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RONALD WILLIAM KNIGHT, Defendant and Appellant.	A153489, A156870 (Humboldt County Super. Ct. No. CR1704394)

A jury convicted defendant Ronald William Knight of possession of methamphetamine for sale (Health & Saf. Code, § 11378),[1] misdemeanor possession of more than 28.5 grams of marijuana (§ 11357, subd. (b)(2)), and misdemeanor possession of a methamphetamine pipe. (§ 11364, subd. (a)). The trial court suspended imposition of sentence and placed defendant on probation for two years. In his appeal from the judgment, defendant contends the evidence does not support his methamphetamine-related convictions, the trial court improperly admitted opinion evidence of his guilt, his counsel rendered ineffective assistance in failing to object to the improper testimony, and the matter should be remanded for a hearing on his ability to pay the fines, fees, and assessments imposed by the court. In a petition for writ of habeas corpus, defendant also raises his claim of ineffective assistance of counsel. We shall remand the matter for a hearing on his ability to pay those amounts, otherwise affirm the judgment, and deny the petition for writ of habeas corpus.

[1] All undesignated statutory references are to the Health and Safety Code.

I. BACKGROUND

Officer Cory Crnich of the Eureka Police Department was on foot patrol in an amphitheater park area in Eureka about 7:00 on the morning of October 24, 2017. During his assignment as a beat officer, he had received complaints about people camping there and leaving trash behind. The upper portion of the amphitheater was flat and acted as a walkway. It was eight feet wide. Crnich saw six or seven people sleeping in the walkway, with items such as backpacks or suitcases close to each person.

Crnich woke defendant to issue a citation. When Crnich ran defendant's name through dispatch, he found defendant had outstanding warrants for his arrest based on camping citations, and he told him he was under arrest. The other people left, taking with them the property that had been around them.

Defendant had a bicycle with him. His head had been either touching or close to the bicycle—close enough that Crnich wiggled the handlebars to wake him up—and there were bags on the ground next to his head and on the handlebars. Defendant's head was covering a pink bag. A purse-type gray bag was on the ground by where defendant's head had been, next to the pink bag; Crnich thought defendant's head had been covering the gray bag. A body camera recording shows the gray bag was touching or almost touching both the bicycle wheel and the pink bag. An open pocket knife was next to the gray bag. There was a small broken glass methamphetamine pipe where defendant had been laying his head.

Crnich searched the gray bag and found a large quantity of small baggies, a marijuana pipe, a digital scale with white residue that appeared to be methamphetamine, and four baggies of methamphetamine, weighing 3.83, 3.82, 3.73, and 2.07 grams respectively. Some of the baggies were black and had a yellow skull pattern on them. In a cooler bag on the bicycle's handlebars, Crnich found a similar black baggy with skulls on the front of it.[2]

[2] The cooler bag was also gray. We will refer to it as the "cooler bag." References in this opinion to the "gray bag" are to the bag containing methamphetamine that was found on the ground.

Crnich searched defendant and found 64.42 grams of marijuana in his jacket pocket, and two cell phones. He had a bag of change in one pocket and miscellaneous change in another pocket. There was a dollar bill with the digital scale.

Crnich described the location of the other people when he arrived at the amphitheater. The people were close together, and it would have been difficult to navigate a path between them. The person closest to defendant was "sort of foot-to-foot" with him, and someone else was sleeping next to her. Two other people were sleeping with their feet toward defendant's bicycle. While Crnich was writing the citation, no one came close to defendant.

Crnich testified that he had seen defendant and numerous other people at the amphitheater at dawn the previous morning, October 23, and had told them to leave, explaining that the park was closed at night. When defendant left, he took his bicycle and several bags; he testified that one of them—hanging from the handlebars—appeared to be the same as that found to contain methamphetamine on October 24. A video recording of the October 23 incident does not show bags on the handlebars, but it shows defendant carrying multiple bags; among them, he appears to have a pink bag slung over his far shoulder and a bag similar to the cooler bag found on the bicycle handlebars the following day.

Crnich testified to some inconsistencies in his recollection of events. Both in the report he wrote later on October 24 and at the preliminary hearing, he stated that the gray bag was on the bicycle's handlebars, but his body camera recording indicated it was on the ground where defendant's head would have been. He had been "pretty confident in [his mistaken] recollection" of where he found the gray bag. He also testified at the preliminary hearing that he could not describe specifically the property defendant had with him on October 23, the day before the incident in question here.

Neither the pipe nor contents of the gray bag were tested for fingerprints. Crnich did not know whether the cell phones found on defendant were operable. Defendant did not have a "pay and owe" sheet.

Allen Aubuchon, an expert in the possession of controlled substances for sale, testified that the amount of methamphetamine in each baggie, the packaging, and the presence of a scale and two cell phones indicated the methamphetamine was possessed for sale. He also noted that it was uncommon for those who sold drugs to allow someone else to hold their property, and that in this case, the methamphetamine was found all in the same bag by defendant's head. The closer that drugs are to a person, the more likely they belong to that person. The amount of methamphetamine and the small amount of money in defendant's possession was consistent with him having recently purchased (or "re-upped") his supplies.

II. DISCUSSION

A. Sufficiency of the Evidence

Defendant contends the evidence is insufficient to show he possessed the bag containing methamphetamine or the methamphetamine pipe. In considering these challenges, we " 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) Where the evidence is sufficient to support a finding of guilt, we may not reverse merely because the evidence could also be reconciled with the defendant's innocence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.)

Possession may be actual or constructive, and more than one person may possess the same contraband. (*People v. Williams* (2009) 170 Cal.App.4th 587, 625.) "Actual possession means the object is in the defendant's immediate possession or control. A defendant has actual possession when he himself has the [contraband]. Constructive possession means the object is not in the defendant's physical possession, but the defendant knowingly exercises control or the right to control the object. [Citation.] Possession of [an object] may be proven circumstantially, and possession for even a limited time and purpose may be sufficient." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.)

Defendant contends no substantial evidence connected him to the gray bag. He points out there were other people sleeping in close proximity who had their possessions with them, and contends it was mere conjecture that he was the owner of the gray bag. He also notes that he did not flee or make incriminating statements, which militates against consciousness of guilt. And, he argues, the fact that he had other items of value in his jacket pocket—such as the marijuana—indicates that if the methamphetamine was his, he would likewise have stored it on his person, rather than where someone could take it as he slept.

As defendant points out, a person's mere presence in a place where drugs are found does not prove possession. (*People v. Johnson* (1984) 158 Cal.App.3d 850, 853–854.) But we have reviewed both Officer Crnich's testimony and the video from the body camera, and we conclude substantial evidence supports the jury's finding. Defendant was sleeping close to the wall bordering the walkway, his head facing it. Immediately behind his head was the bicycle wheel. The back portion of defendant's head was over the pink bag, and there is evidence his head was also over the gray bag, which was immediately next to the pink bag, partially protected from the main part of the path by the bicycle wheel, which was approximately perpendicular to the wall. It does not appear that anyone else slept with their head near the pink and gray bags, and the video does not show anyone depositing the gray bag by the bicycle wheel. Although other people's belongings were present in the walkway, they do not appear to be in the area where the pink and gray bags were found, and defendant's head rested. The jury could reasonably conclude the gray bag was in defendant's possession.

The record is also sufficient to support a conclusion defendant possessed the methamphetamine pipe. It was found in the place where defendant had been laying his head, partially bordered by the bicycle wheel and the wall. Although defendant suggests the pipe might have been there already when he went to the amphitheater the previous night, a jury could reasonably conclude he exercised dominion and control over it.

B. Expert Testimony

The prosecutor asked Officer Aubuchon the following question: "So you heard testimony that there were black dime bags with the black design and a gold skull inside and there was many of them inside of the bag with the methamphetamine in it. You also heard testimony that—and you saw a video of the bag that was on the defendant's bike with the same exact type of bag with the same sort of design. You heard testimony that Mr. Knight had 64 grams of marijuana on his person, and that there is a marijuana pipe inside of the bag with the methamphetamine. You also heard testimony that there was a methamphetamine pipe right next to the defendant, and you heard testimony and you saw a video of Mr. Knight with what appears to be the bag of methamphetamine under his head right next to his head. [¶] Based on those facts and your opinion, do you believe that that bag was possessed by Mr. Knight?" Aubuchon replied, "Yes." Defense counsel did not raise any objection to the question.

Both on direct appeal and in a petition for writ of habeas corpus, defendant contends that this evidence was inadmissible and that his counsel rendered ineffective assistance in failing to object to it. We agree that the question was improper, and indeed, the Attorney General does not contend otherwise. It is well established that "[a] witness may not express an opinion on the defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] 'Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.' " (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77; accord, *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182–1183.) We agree with defendant that the question as formulated—that is, asking Aubuchon for his opinion on whether defendant possessed the bag with methamphetamine—violated this rule.

We also conclude, however, that defense counsel's failure to object to this evidence does not constitute reversible ineffective assistance. "Establishing a claim of

ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result." (*People v. Dennis* (1998) 17 Cal.4th 468, 540.) If a defendant fails to show that counsel's actions were prejudicial, we may reject the claim of ineffective assistance without deciding whether counsel's performance was deficient. (*People v. Mayfield* (1997) 14 Cal.4th 668, 784 (*Mayfield*).) Prejudice is established when counsel's performance " 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*Ibid*., quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) Prejudice must be proved as a matter of " 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

Defendant has not established prejudice under this standard. The evidence showed the bag was either under defendant's head or extremely close to it, and baggies with the same skull design were found it both the methamphetamine bag and a bag found on his bicycle's handlebars. The jury had before it the video of the incident and could reach its own conclusions about how close the bag was to defendant. In his testimony, Aubuchon noted that the methamphetamine bag was found by defendant's head, that it was uncommon for those who sold drugs to let someone else hold their property, and that the closer drugs are to a person, the more likely they belong to him. This testimony leads almost necessarily to a conclusion that the evidence introduced at trial meant the defendant possessed the bag containing methamphetamine. Aubuchon's answer to the improper question added little more. And if the trial court had sustained an objection to the improper question, the prosecutor would have been free to reformulate it as a hypothetical question closely tracking the evidence in the case. (*People v. Vang* (2011) 52 Cal.4th 1038, 1042, 1045–1046.)

Defendant argues that the questions the jury submitted to the court during deliberations indicate this was a close case. For instance, the jury asked for a video player to watch the DVDs; in apparent reaction to defense counsel's argument about the size of the area where the campers were sleeping, it asked for a measurement of the jury box; it asked for a definition of possession of a controlled substance; and it asked for "the transcript surrounding Defendant's exhibit 'C,' " a still shot from the video showing defendant, his bicycle, the pink bag, and the gray bag. But the fact that the jury examined the evidence carefully before concluding defendant possessed the bag does not persuade us that Aubuchon's response to the single improper question " 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*Mayfield*, *supra*, 14 Cal.4th at p. 784.)

C. Ability to Pay Fines, Fees, and Assessments

The probation officer's report recommended that defendant pay a number of fines, fees, and assessments. At the sentencing hearing, defense counsel asked the court to waive any fines or fees that were discretionary, arguing that defendant did not have an income that would allow him to pay them. The prosecutor responded, "In regards to the fees, I mean, Mr. Knight, I believe, is indigent. He was when he was arrested. So we would submit on that." "Based on financial abilities," the trial court waived several of the fees and imposed only a restitution fine at the statutory minimum of $300 (Pen. Code, § 1202.4, subd. (b)), a court security fee of $40 (Pen. Code, § 1465.8, subd. (a)(1)), and a court facilities assessment of $30 (Gov. Code, § 70373), with a probation revocation restitution fine imposed and stayed (Pen. Code, § 1202.44).

After briefing in this case was complete, we granted defendant's request for supplemental briefing to address whether a remand is required to determine whether he is able to pay those amounts, in light of the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). The court there held that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373," and that, "although

Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Id*. at p. 1164.)

The Attorney General contends defendant forfeited this issue by failing to raise it at the sentencing hearing. In *People v. Johnson* (2019) 35 Cal.App.5th 134, a different panel of this court rejected a similar contention where the trial court imposed the statutory minimum fine, based on the "well-established exception to the forfeiture doctrine where a change in the law—warranting the assertion of a particular objection, where it would have been futile to object before—was not reasonably foreseeable." (*Id*. at pp. 137–138.) This court concluded that, although *Dueñas* is grounded in longstanding due process principles, "the statutes at issue here stood and were routinely applied for so many years without successful challenge [citation] that we are hard pressed to say its holding was predictable and should have been anticipated," at least where (as here) the fines and fees imposed were the statutory minimum. (*Id*. at p 138, and fn. 5.) We adhere to that view here and conclude that defendant did not forfeit his challenge to the fines and fees.

The Attorney General argues further that remand is not necessary because the record does not show defendant would be unable to pay amounts imposed and because defendant does not point to *additional* consequences of his alleged inability to pay the fines and fees. In particular, he points to the facts that defendant had apparently acquired stable housing since his arrest, that he had expressed interest in securing employment, and that he had held down jobs in the past, apparently most recently in 2009. Balanced against these considerations, though, are the facts that both parties acknowledged defendant's indigence at the sentencing hearing and that the court waived the discretionary fees in light of his financial situation. While we cannot say what determination the trial court will make, we conclude defendant has a right under *Dueñas* to a hearing on his ability to pay the amounts imposed.

At this hearing, as explained in *People v. Castellano* (2019) 33 Cal.App.5th 485, 490, defendant must "present evidence of his or her inability to pay the amounts contemplated by the trial court. In doing so, the defendant *need not present evidence of potential adverse consequences beyond the fee or assessment itself*, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*Ibid.*, italics added.) The trial court must then consider all relevant factors in determining his ability to pay the amounts imposed. (*Ibid*.)

III. DISPOSITION

The convictions are affirmed. The matter is remanded to give defendant an opportunity to request a hearing on his ability to pay the fines, fees, and assessments imposed by the trial court. If the trial court determines defendant is unable to pay, it shall strike the court facilities assessment (Gov. Code, § 70373) and the court security fee (Pen. Code, § 1465.8, subd. (a)(1)), and/or stay execution of the restitution fine (Pen. Code, § 1202.4, subd. (b)). If the trial court determines defendant can pay these amounts, the fines, fees and assessments imposed may be enforced.

The petition for writ of habeas corpus is denied.

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TUCHER, J.

WE CONCUR:

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STREETER, Acting P. J.

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BROWN, J.